SERVED: October 2, 1992

NTSB Order No. EA-3680

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of September, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. LAWRENCE O. LAVALLEE, Respondent.	Docket SE-10629

OPINION AND ORDER

The Administrator has appealed from the oral initial decision and order Administrative Law Judge Jerrell R. Davis rendered at the conclusion of a hearing held on July 19, 1990.[1] By that decision, the law judge modified a revocation order to a nine-month suspension of respondent's commercial pilot certificate and otherwise affirmed the Administrator's order, the

[1]An excerpt from the hearing transcript containing the initial decision is attached.

gist of which alleged that respondent had operated an unairworthy aircraft, without the requisite number of crewmembers, and when he did not possess a current medical certificate. The Administrator alleged that as a result of these allegations, respondent violated sections 61.3(c), 61.31(a), 61.58, 91.4, 91.29(a), 91.27(a)(1) and (a)(2), 91.9, 91.30(a) and (b), 91.33(b)(9), 91.31(a) and (b)(1), 91.165, and 91.169(f) of the Federal Aviation Regulations (FAR), 14 C.F.R. parts 61 and 91.

The issue before the Board in this appeal deals solely with the law judge's ruling that a purported settlement agreement between the parties had been reached and then rescinded by the Administrator's counsel. The law judge apparently accepted respondent's claim that he had obtained an agreement with FAA counsel, and then proceeded to enforce that agreement by affirming the allegations but modifying the sanction to a nine-month suspension, which is the period of suspension respondent claims to have agreed upon with FAA counsel. We find merit in the Administrator's contention that the law judge was without authority to enforce this agreement. For the reasons that follow, we will reverse the law judge's order and remand the case for further proceedings.[2]

According to documents contained in the Board's file, the Administrator filed the order as the complaint in this matter on

[2]While it occurs to us that respondent has essentially admitted all of the allegations in his efforts to enforce the purported settlement agreement, the Administrator has not asked the Board to affirm the revocation order in its entirety, but asks only that the case be remanded for a hearing.

October 10, 1989. The order indicates that information was presented on respondent's behalf by Jack Sobelman, both by telephone and in writing.[3] On December 12, 1989, respondent, pro se, filed an answer to the Administrator's complaint.[4] On February 6, 1990, the Administrator served a Request for Discovery on respondent, who at the time was apparently still unrepresented by legal counsel. On April 18, 1990, a note in the file to the law judge indicates that according to FAA counsel, respondent had now retained an attorney in this matter. A motion to compel discovery was filed by the Administrator on April 30, 1990, with service on that attorney. On May 21, 1990, respondent's counsel served the FAA with a notice of deposition and a request for discovery. On May 24, 1990, respondent's counsel responded to the FAA request for discovery, indicating a number of witnesses he intended to call in respondent's defense. On June 20, 1990, the Administrator responded to respondent's discovery request. The order was amended on July 3, 1990. Other subsequently filed discovery pleadings are contained in the file. On June 28, 1990, respondent's counsel filed a pleading, treated by the law judge as a supplemental answer to the complaint, in which respondent alleges as an affirmative defense that this matter was settled between the parties but that the settlement was "improperly rescinded."

[3]Mr. Sobelman is apparently not an attorney.

[4]Respondent admitted the violations of FAR §§ 61.3(c), 61.31(a), 61.58, and 91.4 but denied the remaining allegations.

On July 19, 1990, a hearing was held in this matter. Before proceeding to the merits of the case, the law judge questioned respondent's counsel concerning his "affirmative defense" that there had been a settlement agreement. Respondent's counsel told the law judge that FAA counsel[5] had offered to respondent a nine-month suspension, and that she had instructed respondent to send his certificate to her by certified mail. Counsel also told the law judge that he then called FAA counsel, and that she verified this information. (TR-14). Respondent then offered the following documents into evidence:

1. A letter dated March 27, 1990, from respondent's counsel to FAA counsel, in which respondent proposes that he serve a nine-month suspension, but that he serve it in three three-month off-season periods over three years, so as to not disrupt his business.[6] (Ex. R-1)

2. A letter dated April 16, 1990, in which FAA counsel responds to respondent's counsel as follows:

> "You have offered to accept a 9-month suspension in segments of 3 months for 3 years. I have been advised that it is against the FAA enforcement policy to allow suspensions that are not continuous. Therefore, I have to reject your offer.
>
> I must tell you that the FAA has rejected a number of former proposals made by a representative for Mr. Lavallee. Although I am sympathetic to the fact that, if a revocation is sustained by a law judge, it would be a hardship on the airman in that it would put him out of business. It is our

[5]The FAA attorney at the hearing was not the attorney involved in the settlement discussions, who was absent in order to take the California Bar exam.

[6]Respondent earns his living through the purchase and sale of aircraft.

> position that this case involves some serious questions of judgment and we feel a revocation is appropriate." (Ex R-2)

3. An affidavit by respondent in which he claims that in a phone conversation with FAA counsel on May 1, 1990, she offered him a settlement by stating, words to the effect of, "would you accept a 9 month suspension," to which respondent claims he responded affirmatively. Respondent asserts that FAA counsel then explained to him how to tender his certificate to the FAA by certified mail,[7] and told him to call his attorney to confirm the settlement in writing. (Ex R-6).

4. A letter from respondent's counsel to FAA counsel dated May 2, 1990, which reads as follows:

> "This will confirm your conversation with Larry LaVallee, as well as our subsequent conference.
>
> Mr. LaVallee's pilot certificate is being forwarded to you under separate cover.
>
> You are authorized to retain this certificate for a period of nine months from the date of receipt. It is agreed, by way of this letter, that Mr. LaVallee's privileges, represented by said certificate, shall be suspended for a period not to exceed nine months, at which time the certificate shall be returned to Mr. LaVallee.
>
> If, for any reason, you are unable to implement this agreement, Mr. LaVallee's certificate shall be returned forthwith." (Ex R-3)

5. A letter dated May 3, 1990, in which FAA counsel states in pertinent part:

> "Essentially, Mr. LaVallee and I discussed a 9 month suspension of his certificate. I had indicated to him that I would discuss the matter again with our regional Flight Standards Division to determine whether they would be willing to settle for 9 months. I received today Mr.

[7] Respondent nonetheless forwarded it by express mail.

> LaVallee's certificate and letter in which he indicates that we had agreed to a 90-day suspension. There was no discussion of a 90-day suspension....This morning our Flight Standards Division indicated to me that, as stated previously, they feel the violations are serious in nature and warrant the sanction as proposed. It appears that this position is firm and does not merit further discussion as the previous discussions have been fruitless...."

The letter indicates respondent's certificate was returned under separate cover. (Ex R-4)

Assuming, arguendo, that the Board had the authority to enforce a settlement agreement, we are far from persuaded that the respondent has established that the Administrator entered into one here. Our review of the documents indicates to us that respondent made several offers of settlement which were repeatedly declined by FAA counsel. At most, it appears to the Board, FAA counsel may have agreed to take the matter to the investigating authorities who initiated the action, in her efforts to placate an extremely persistent airman who insisted on contacting FAA counsel directly, notwithstanding the fact that he had already retained counsel. Since we do not have the benefit of FAA counsel's version of the events, we must rely on respondent and his counsel's averments which, in our view, are not convincing when considered in light of the inconsistent documentary evidence which they produce. We note, for example, that from the outset, FAA counsel indicated that the Administrator considered revocation appropriate, see Exhibit R-2, and certainly this position is consistent with similar matters which have been before the Board in the past. Secondly, we find

counsel's explanation of the language at the end of his "confirming" letter less than compelling; if he believed he had a binding agreement with FAA counsel, why would he have suggested that FAA counsel might nonetheless be unable to implement it, before surrendering his client's certificate?[8]

Notwithstanding our belief that the record does not support the law judge's conclusion that a settlement agreement had been reached, we remain of the view, demonstrated in prior cases, that our statutory mandate to review on appeal the suspension or revocation of any operating certificate or license issued under Section 609 of the Federal Aviation Act of 1958[9] does not encompass the enforcement of settlement agreements between holders of certificates and the Administrator. See Administrator v. Rippee, 4 NTSB 1041 (1983) and Administrator v. Hegner, 5 NTSB 148 (1985). We must therefore find that the law judge lacked authority to rule on the validity of the disputed settlement, and that the matter should be remanded for further proceedings.

[8]Moreover, if counsel had been instructed by FAA counsel to send the certificate by certified mail, why did he ignore those instructions and forward the certificate by express mail? Further, why did counsel go to the expense of discovery, including the deposition of several witnesses the week before hearing, if in fact he believed he had a binding settlement?

[9]49 U.S.C. § 1429.

ACCORDINGLY, IT IS ORDERED THAT:

1. The law judge's order is reversed; and

2. The matter is remanded to the law judge for further proceedings.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.